No. 84-336

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BUSHEY, *et al.*,

Petitioners,

v.

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents,

GERALD A. WELLS, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS-INTERVENORS' BRIEF IN OPPOSITION

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Gerald A. Wells, Wilbur I. Wright, Jospeh P. Bates, Thomas D. Haskell and Percy Jones, respondents-intervenors on

this petition (hereinafter referred to as "intervenors"), respectfully submit this brief in opposition to the petition for a writ of certiorari. Intervenors submit that the petition should be denied because:

1. The decision of the Second Circuit is in accord with established law under Title VII of the Civil Rights Act of 1964, including the fundamental principle that voluntary compliance is the preferred means of achieving Title VII's goals; and

2. The cause has been remanded to the United States District Court for the Northern District of New York for discovery and trial, and review by this Court at this time in the absence of a complete factual record would be premature.

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly decided, in light of the strong preference for voluntary compliance under Title VII of the Civil Rights Act of 1964 as amended, that the New York State Civil Service Commission could voluntarily adjust the scores of all candidates who had taken a written civil service promotional examination in order to eliminate the adverse racial impact of the examination, without waiting to be sued by minority candidates.

2. Whether, in light of the fact that the cause has been remanded to the district court for discovery and trial of issues directly related to those raised in the petition, and the fact that the

petition seeks review on legal grounds which were not considered in the decisions below, this Court should refrain from exercising its right to hear the case.

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ACTS, STATUTES, RULES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq.; 29 C.F.R. § 1607.4(D); New York Civil Service Law § 52(8); 4 NYCRR 67.1.[1] 29 C.F.R. § 1607.4 is set out in the Appendix; the other provisions have been previously provided in Appendix D to the Petition.

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[1] Although the complaint in this action purported to state causes of action under the Fifth and Fourteenth Amendments to the United States Constitution, both the district court and the Court of Appeals have considered the issues raised herein solely under Title VII of the Civil Rights Act. Therefore, if this Court determines to grant the writ, review of the cause should be limited to issues arising under that statute. Accordingly, intervenors disagree with petitioners that any constitutional provisions are presently at issue.

STATEMENT OF THE CASE

A. The Nature of the Case

The present "reverse discrimination" action was commenced on November 2, 1982 by several white officers of the New York State Department of Correctional Services ("Corrections"). The gravamen of plaintiffs' complaint was that a scoring procedure adopted by the New York State Civil Service Commission ("Civil Service") to rank candidates who had taken an examination for the position of Corrections Captain ("Examination No. 37-526") caused minority candidates to receive a "racial bonus" violative of Title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000e, et seq.,[2] and of the Fifth and Fourteenth Amendments to the United States Constitution.

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[2] Title VII provides:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The scoring procedure at issue, known as "separate frequency distribution" or "normalization," was adopted by the State to compensate for the disparate racial impact of the examination, which Civil Service determined to exist after an analysis of candidates' raw scores showed that white candidates passed Examination No. 37-526 at twice the rate of minority candidates. As a result of the normalization procedure, eight additional minority candidates were included in an eligible list of almost 130 names. No white candidates were excluded from the list.

By order dated February 16, 1983, the district court permitted Gerald A. Wells, Wilbur I. Wright, Joseph P. Bates, Thomas D. Haskell and Percy Jones to

intervene as defendants in this action pursuant to Rule 24(b)(2) of the Fed. R. Civ. P. Each is a minority candidate whose name appears on Eligible List 37-526.

Following limited discovery, all parties filed motions for summary judgment in the district court in June, 1983. On October 4, 1983, the district court decided that the State's scoring method discriminated against white officers under Title VII, and ordered the State to stop using Eligible List 37-526 to make either provisional or permanent appointments to the Captain position. Both the State and the intervenors appealed.

The Second Circuit, in reversing the lower court's grant of summary judgment, determined that the district judge had misunderstood and misapplied

the applicable legal principles under Title VII. Specifically, the Court of Appeals ruled that the district judge erred in finding: 1) that the factors relied upon by the State were insufficient to establish a prima facie case of racial impact; 2) that the State was required to attempt rebuttal of the prima facie case before it could take voluntary action to cure the adverse impact; and 3) that the methodology adopted by the State to adjust candidates' scores was fundamentally flawed.

The Second Circuit recognized that the position advocated by the white officers and adopted by the district court would impede an employer from taking voluntary action to cure the obvious adverse impact of a selection device, and

would instead require the employer in each instance to engage in protracted and unnecessary litigation to eliminate discrimination.

The case has now been remanded to the district court for further discovery and trial.

B. Factual Background

On January 30, 1982, Civil Service administered a test for promotion of candidates to the position of Corrections Captain.[3] At the time Examination No.

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[3] In extensive previous litigation, the propriety of examinations administered by Civil Service for the titles of Corrections Sergeant and Corrections Lieutenant had already been considered. See Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974), aff'd in part and rev'd in part, 520 F.2d 420

[Footnote continues]

37-526 was given, no minority officers held permanent appointments to the position of Corrections Captain.

After the examination was administered, Civil Service tabulated each candidate's correct and incorrect answers to produce a set of raw scores. Upon review of these raw scores, it became clear that white candidates had

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[Footnote continued]

(2d Cir.), reh. en banc denied, 531 F.2d 5 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), reh. denied, 429 U.S. 1124 (1977), on remand, 482 F. Supp. 1179 (S.D.N.Y.), aff'd, 628 F.2d 796 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981)("Kirkland Sergeants"), and Kirkland v. New York State Department of Correctional Services, 552 F. Supp. 667 (S.D.N.Y. 1982), aff'd, 711 F.2d 1117 (2d Cir. 1983), cert. denied, ____ U.S. ____, 104 S. Ct. 997 (1984) ("Kirkland Lieutenants").

passed the examination at approximately twice the rate of minority candidates.[4] A tabulation of raw scores produced the following results:

	Test Takers	Test Passers	Passing Rate
White	243	119	49%
Minority	32	8	25%

The State reviewed these results in light of the "four-fifths" rule of the E.E.O.C. Uniform Guidelines on Employee Selection,[5]

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[4] Pursuant to New York State law, a candidate must achieve a score of 70% or better to pass a civil service examination. N.Y. Civ. Serv. Law § 52(8), 4 NYCRR 67.1(a). For Examination No. 37-526, which had 103 questions, the passing score was therefore 72.

[5] E.E.O.C. Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D), as set forth in full in the appendix to this brief. These guidelines provide that a selection rate for minorities which is less than 80% of the selection rate for the highest scoring group is regarded as evidence of adverse racial impact.

and determined that the examination had an adverse impact on minority candidates, in that the passing rate for minority candidates was substantially less than four-fifths the rate of white candidates. To correct this statistical showing of adverse impact, the State voluntarily adjusted the scores of all candidates by converting them to separate frequency distributions (known commonly as "bell curves"), and then equating or normalizing the distributions. The same method of score adjustment was applied to the scores of white and minority candidates.

Civil Service had no means to conduct a comparative study of job performance of white and minority Corrections Captains before adjusting the scores -- at the time Examination No. 37-526 was administered,

there were no permanent minority Captains whose performance could be evaluated. However, Civil Service did have good reason to believe that the disparity in scores was not the result of actual differences in job performance between whites and minorities. A random sample of job performance of candidates for the most recent Corrections Lieutenant examination showed no statistically significant differences in job performance between minorities and nonminorities, and a study of job performance conducted as a result of earlier litigation concerning the Corrections Sergeant title also showed no significant differences.[6]

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6 See Bushey v. New York State Civil Service Commission, 733 F.2d 220, 222 n.3 (2d Cir. 1984).

After completing the normalization of candidates' scores, Civil Service propounded a numerical list of passing candidates who were eligible for promotion to the position of Captain. This list took into account not only candidates' test scores, but applicable seniority and veterans' credits (as required by State law). Shortly after the list was promulgated, plaintiffs commenced the present lawsuit claiming that the scoring procedure adopted by the State discriminated against white candidates.

REASONS FOR DENYING THE WRIT

I. The Decision of the Second Circuit is in Accord with Established Law Under Title VII, Including the Fundamental Principle that Voluntary Compliance is the Preferred Means of Achieving Title VII's Goals.

Although petitioners strain to show otherwise, the simple fact is that the

decision of the Second Circuit in this case adheres to the principles enunciated by this Court in earlier Title VII cases.

A. The Basis of the Circuit Court's Decision

The first question considered by the Circuit Court was whether the State had properly determined that the lopsided raw score results of Examination No. 37-526 established a prima facie case of adverse impact. Bushey v. New York State Civil Service Commission, 733 F.2d 220, 224-226 (2d Cir. 1984). Applying the teachings of Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971), the Second Circuit correctly concluded that a statistical showing of adverse racial impact is sufficient to

make out a prima facie case under Title VII. See also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), and New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979).

Once the State determined that the raw-score passing rate for minority candidates was only half that of whites, it relied upon the E.E.O.C. "four-fifths" rule to decide that the test had discriminatory impact and that score adjustment would therefore be proper. The important role of the E.E.O.C. guidelines in making determinations of this kind has been recognized by this Court, which has declared that the guidelines are entitled to "great deference." Albemarle Paper Co. v. Moody, supra, 422 U.S. 405, 431 (1975); see also

Griggs v. Duke Power Co., supra, 401 U.S. 424, 433-34 (1971).

The Circuit Court then proceeded to consider whether there could be found in the language of Title VII or in the jurisprudence related thereto, any suggestion that an employer must attempt to rebut the prima facie case of adverse impact before voluntarily adopting curative measures. It concluded that the imposition of such a burden "is contrary to the case law and the statute's underlying policy." 733 F.2d at 226. The correctness of this finding is supported by numerous Supreme Court decisions holding that voluntary compliance is the preferred means to achieve Title VII's goal of eliminating employment discrimination. See Carson v. American Brands, Inc., 450

U.S. 79, 88 n.14 (1981); United Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979); Regents of the University of California v. Bakke, 438 U.S. 265, 364 (1978) (Op. of Brennan, White, Marshall and Blackmun); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

As the Court of Appeals noted, the rebuttal burden urged by petitioners directly contravenes the approach adopted by this Court in United Steelworkers v. Weber, 443 U.S. 193 (1979).

> Without requiring a judicial determination of racial discrimination (in fact, the defendant therein denied that it had engaged in past discrimination), the majority in Weber upheld, as permissible under Title VII, an affirmative action plan "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." Id. at 209, 99 S. Ct. at 2730 (footnote omitted). In doing so, the Court rejected the

> contention raised by nonminority plaintiffs that a judicial determination of racial discrimination was a necessary predicate to the adoption of race-conscious remedial measures. The broadness of the majority's view is suggested by Justice Blackmun's concurrence, which in urging a narrower ground nevertheless noted that "[t]he Court . . . declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.'" Id. at 212, 99 S. Ct. at 2731.

733 F.2d at 227-28 (footnote omitted).

Petitioners attempt to distinguish Weber by suggesting that the presence of a collective bargaining agreement in that case was in some way essential to the outcome (Petition at 14). Yet there is nothing in the language of Weber to suggest that the Court's decision hinged on the agreement, and petitioners have

not cited a single word in support of their view. The uncomplicated holding of Weber -- that Congress did not intend to prevent employers from taking voluntary measures under Title VII to eliminate discrimination in traditionally segregated job categories -- is particularly applicable in this instance, since, at the time Examination No. 37-526 was administered, not a single minority officer held a permanent position as Corrections Captain.

In a case recently decided by this Court and relied upon by petitioners, Justice O'Connor, writing for the majority, noted:

> [T]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to

> make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.

Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 228 (1982). The rule urged by petitioners would make voluntary compliance in the face of obvious adverse impact virtually impossible, and would leave both the employer and the victim of discrimination no choice but to enter into litigation to cure discriminatory practices. The decisions of this Court fully support the Second Circuit's rejection of this inefficient, backward-thinking principle.

B. Petitioners' Alleged Points in Error

Steering clear of the settled Supreme Court doctrine underpinning the Second Circuit's decision in this case, petitioners attempt to solicit this Court's review by relying on a number of subordinate and tangential issues. Neither singly nor in the aggregate are these matters capable of creating a reviewable issue, where none in fact exists. Nevertheless, intervenors will respond to each in turn.

Petitioners rely heavily on this Court's recent decision in Firefighters v. Stotts, ____ U.S. ____, 104 S. Ct. 2576 (1984), claiming that a single statement in that decision nullifies years of thoughtful jurisprudence supporting

voluntary compliance to end racial discrimination (Petition at 12, 13-14, 20). That statement, in its entirety, reads:

> The settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue.

____ U.S. ____, 104 S. Ct. at 2588. This slender reed, however, will not support petitioners' argument. In the first place, Stotts is plainly distinguishable from the present case since it involved adjustments to an established seniority system, and not a discriminatory selection device. As this Court has often noted, seniority systems occupy a special place under Title VII, resulting from a clearly expressed Congressional intent to protect the vested seniority rights of employees. Id. at ___, 104 S. Ct. at 2587; Pullman-

Standard v. Swint, 456 U.S. 273, 276 (1982); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349-50 (1977). Moreover, a careful reading of the entire paragraph containing the statement upon which petitioners rely reveals that this Court did not intend to discredit the "settlement theory." Rather, the Court expressed its opinion that the Court of Appeals had acted improperly in upholding injunctive relief which contravened the seniority terms of an existing consent decree. Absolutely nothing in the cited paragraph, or in the remaining text of the opinion, indicates that this Court had determined to renounce its established rulings

supporting voluntary compliance with Title VII.[7]

Equally central to petitioners' argument is their oft-repeated assertion that Examination No. 37-526 was a "professionally developed, job-related ability test," and that this "fact" or "admission" precluded the Court of Appeals from finding that the disparate score results constituted adverse racial impact on minority candidates (Petition at 4, 8, 11, 12, 14, 16).[8]

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7 As Justice Stevens noted in a concurring opinion, "[t]he Court's discussion of Title VII is wholly advisory. This case involves no issue under Title VII; it only involves the administration of a consent decree." Id. at ___, 104 S. Ct. at 2594.

8 The intervenors did not make the admission of job-validity petitioners allege, but rather admitted that the entire scoring procedure, including normalization of all candidates' scores, was valid under the circumstances.

Yet, the record in this case contains not a single fact upon which the petitioners' conclusion of job-validity can be based. No study of job-relatedness has been performed with regard to Examination No. 37-526, and it is unlikely that any such study could successfully be undertaken. The reason is simple. Since there are no permanent minority Captains, comparative statistical analysis of white and minority officers would be difficult or impossible.

In the earlier Kirkland Lieutenants litigation,[9] the white officers had urged that validation studies were a necessary precondition to voluntary action to cure adverse impact. The Court of

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[9] See note 3, supra.

Appeals flatly rejected that proposition:

> [The white officers'] argument, however, would turn Title VII law on its head since, as [they] themselves concede, job-relatedness is never presumed and only becomes an issue after it is affirmatively raised by the defendant. . . . Moreover, if [their] position were adopted, no Title VII testing case could be settled by agreement until a judicial determination on the test's job-validity was made. Such a result would seriously undermine Title VII's preference for voluntary compliance and is not warranted.

711 F.2d at 1129-30, cert. denied, 104 S. Ct. 997 (1984) (citations omitted). In the present case, petitioners attempt to avoid the issue by asking their adversaries and the courts simply to assume the validity of the test. Of course, such an assumption is impossible. Absent the assumption, however, petitioners' entire argument collapses, and the correctness of the Second Circuit's

finding regarding adverse impact becomes unassailable.

Petitioners' next point is that the Second Circuit improperly equated a prima facie case of adverse impact with a factual finding of discrimination in alleged ignorance of this Court's holding in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and thereby improperly permitted the State to adopt voluntary actions which harmed white candidates in the absence of a suitable "finding" of discrimination (Petition at 15-16). This argument misconstrues the holding of Furnco. The issue in that case was not the manner in which prima facie evidence of adverse impact should be treated, for that question had long before been settled in McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973), and its progeny. Rather, Furnco stood for the proposition that, in the context of a Title VII lawsuit, an employer should be permitted to attempt rebuttal of the prima facie case if it chooses to do so, using statistical methods if appropriate. 438 U.S. at 479-80. There is nothing in Furnco which requires an employer to attempt rebuttal in litigation; voluntary compromise is one obviously available alternative. Moreover, there certainly is nothing in Furnco which prohibits an employer from taking appropriate voluntary action to cure adverse impact before a lawsuit is commenced by the affected candidates. Voluntary compliance, in fact, is preferred. See supra, pp. 14-16.

Neither of the cases which petitioners cite for the point that certain "findings" are necessary to support remedial action were decided under Title VII of the Civil Rights Act. See Regents of the University of California v. Bakke, 438 U.S. 265 (1978)(decided under Title VI); Fullilove v. Klutznick, 448 U.S. 448 (1980)(decided under the Equal Protection clause of the Fifth and Fourteenth Amendments). Interestingly, petitioners have not called to this Court's attention an en banc decision of the Eighth Circuit in which this issue was considered under Title VII and 42 U.S.C. § 1981. Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981). In Setser the Court of Appeals stated "[t]he employer's internal investigation and analysis of

its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden" in a reverse discrimination lawsuit to show that its actions were remedial in nature. Id. at 968. In the instant case, the State's actions can only be seen as reasonable in light of the prolonged maintenance of the Captain position as an all-white enclave.

Petitioners' final claims are that the State's actions in this case constituted unlawful discrimination against them, established an impermissible racial classification, and resulted in a burden on whites which exceeded the harm to be cured (Petition at 15-19). These arguments are all constitutional in nature, and nearly all of the cases relied upon

by petitioners in this section of their petition were decided on constitutional, rather than Title VII, grounds.[10]

Although petitioners raised certain constitutional claims in their complaint, both the district court and circuit opinions in this case were decided solely under Title VII law. It is axiomatic that this Court will decline to reach constitutional issues when a case may properly be considered on narrower statutory grounds. See, e.g., Harris v.

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[10] E.g., Fullilove v. Klutznick, supra, 448 U.S. 448 (1980); General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982); Hills v. Gautreaux, 425 U.S. 284 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Loving v. Virginia, 388 U.S. 1 (1967).

McRae, 448 U.S. 297, 306-307 (1980); Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 160 n.2 (1979), and cases cited therein. Moreover, this Court has specifically called attention to the importance of this distinction in a case involving employment testing procedures, noting that "[w]e have never held that the constitutional standard for adjudicating claims of invidious discrimination is identical to the standards applicable under Title VII. . . ." Washington v. Davis, 426 U.S. 229, 238-39 (1976). See also, United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979). For this reason, intervenors believe that petitioners are precluded from relying on constitutional doctrine, applying standards wholly different from those

arising under Title VII, in seeking review before this Court.

Even if constitutional standards are entitled to consideration, however, petitioners' arguments must fail. The fact that the remedy adopted by the State to cure a statistical showing of adverse impact might have had a slight negative effect on some white candidates simply does not indicate that the constitutional rights of those individuals were violated. In this case, the remedy adopted by Civil Service was carefully tailored to the harm resulting from the adverse impact of the examination. Normalization did not create a "quota" as petitioners assert (Petition at 17), but rather allowed minority candidates to pass the examination at a rate equal to the

relative job performance of minority officers, as determined in studies conducted in connection with earlier litigation concerning the Corrections Sergeant and Lieutenant titles. See supra, p. 10. Significantly, normalization did not require the removal of a single white candidate from the eligible list. Under these circumstances, it seems clear that the constitutional standards set out in Milliken v. Bradley, 418 U.S. 717 (1974), Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), and the other cases cited by petitioners were met in this instance.

II. The Cause Has Been Remanded to the District Court for Discovery and Trial, and Review by this Court at this Time in the Absence of a Complete Factual Record Would Be Premature.

The Second Circuit has remanded this case to the district court, and discovery is presently being conducted by all parties. The district court has indicated its intention to schedule the cause for trial at an early date. Among the issues to be considered at trial are questions directly related to the matters raised in the petition, such as the job-relatedness of the examination, the trammeling effect, if any, of normalization upon white candidates, and the propriety of the adjustment of Hispanic candidates' scores. Since the proceedings to date have all been had on summary judgment

after very limited discovery, the present factual record is unusually thin. Under these circumstances, this Court should refrain from reviewing the matter until a complete factual record exists. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58 (1916).

CONCLUSION

As Justice O'Connor has written,

> Title VII's primary goal, of course, is to end discrimination; the victims of job discrimination want jobs, not lawsuits.

Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 230 (1982). The decision of the Second Circuit both recognizes and helps to

effectuate this view. Petitioners have not demonstrated that the decision contravenes established Title VII law. For these reasons, intervenors respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Eric J. Lobenfeld
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APPENDIX

29 C.F.R. § 1607.4

§ 1607.4 Information on impact.

A. Records concerning impact. Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently,

such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. Applicable race, sex, and ethnic groups for recordkeeping. The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The

race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action progams, and that such records are not used improperly. See sections 4E and 17(4), below.

C. Evaluation of selection rates. The "bottom line." If the information called for by sections 4A and B above shows that the total selection process

for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative

method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circum-

stances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal

enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence

concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such

data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and

timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

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